

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 98-204
Broadcast and Cable)	
Equal Employment Opportunity)	
Rules and Policies)	
)	
To: The Commission)	

REPLY COMMENTS OF THE LUTHERAN CHURCH-MISSOURI SYNOD

The Lutheran Church- Missouri Synod (the "Church"), the licensee of Stations KFUA(AM) and KFUA-FM, Clayton, Missouri, by its attorneys and pursuant to 47 C.F.R. §§1.415 and 1.419 of the Commission's rules, hereby submits reply comments in response to the comments that have been filed concerning the *Second Notice of Proposed Rule Making* (the "*Second NPRM*"), 67 Fed. Reg. 1704 (January 14, 2002) in the above-captioned proceeding.

Introduction

The Church operates two radio stations in Clayton, Missouri that have a religious mission. KFUA(AM) operates noncommercially with a religious format and KFUA-FM operates commercially, broadcasting classical music with a religious orientation as well as some religious programming. The stations share employees. Both stations are housed on the grounds of the Church's Concordia Seminary and are "dedicated to the task of carrying out in their way the Great Commission which Christ gave to His Church, to preach the Gospel to every creature and to nurture and serve the people in a variety of ways." The Church's efforts to comply with the Commission's former EEO rules led to the decision of the U.S. Court of Appeals for the D.C.

Circuit that the Commission's then-existing affirmative action rules violated the equal protection component of the First Amendment. *Lutheran Church-Missouri Synod*, 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998). As a result of its prior experience in attempting to comply with the FCC's EEO rules, the Church is understandably concerned about how new rules will affect religious broadcasters.

In the *Second NPRM*, the Commission has proposed to readopt a policy that it announced in 2000.¹ That policy stated that religious broadcasters that elected to apply a religious qualification to their employees were not required to comply with the specific outreach recruitment requirements set out in those regulations or the menu options thereunder but were required to make reasonable good faith efforts to recruit widely among their co-religionists.

In Comments in this proceeding filed April 15, 2002, the National Religious Broadcasters ("NRB") supported the Commission's proposal in the *Second NPRM* to readopt this limited exemption to the broadcast EEO rules for religious broadcasters. However, the NRB urges the Commission to clarify the agency's definition of a "religious broadcaster." According to the NRB Comments, this will "reduce unnecessary uncertainty as to which religious licensees qualify for the exemption." The NRB has requested that the Commission clarify that if a for-profit broadcaster meets the following criteria - all based on the agency's existing factors - the licensee will be deemed a religious broadcaster without further question: (1) the licensee devotes at least 50% of its airtime to religious programming, and (2) the licensee has either (a) organic

¹ *Report and Order in MM Docket Nos. 98-204 and 96-16*, 15 FCC Rcd 2393 (2000) ("2000 Report and Order"), *recon. denied* 15 FCC Rcd 22548 (2000), *vacated MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *reh'g and reh'g en banc denied* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied* 122 S.Ct. 920 (2002).

organizational documents that explicitly “set forth a religious purpose” or (b) a “distinct religious history.”

The Church is concerned that the NRB’s proposed clarification is unnecessary and muddies the waters. For instance, the Church’s FM station operates commercially and programs classical music with a religious orientation as well as religious programming. Under the NRB’s proposed definition, this would appear to suggest that the Church’s FM station would have to devote at least 50% of its time to religious programming, notwithstanding the fact that the licensee is a church.

The Church respectfully submits that the proposed clarification may not be necessary. In its *2000 Report and Order*, the Commission stated: “We clarify that nonprofit status is not a sole determining factor and, as indicated in the NPRM, is only one of several factors to be considered when determining religious broadcaster status. Accordingly, a licensee’s lack of nonprofit status will not automatically disqualify it from claiming religious broadcaster status.”² Moreover, the Church is concerned about any definition that hinges on the amount of religious programming that a licensee airs since such determinations are at bottom subjective.

If the Commission determines that clarification is in order as suggested by NRB, the Church submits that the language suggested by the NRB should be modified so as to make it clear that a religious entity (such as a church) is exempt whether or not its licensed station operates commercially or noncommercially. The Church thus suggests the following definition which differentiates between religious entities such as churches, synagogues etc., and for-profit broadcasters who air religious programming:

Section 73.2080 (a) General EEO Policy [Retain first, second and third sentences] For purposes of this rule, a religious broadcaster is a licensee

² 15 FCC Rcd 22548 at para.158.

or permittee of a commercially or noncommercially operated AM, FM, TV or international broadcast station (as defined in this part) which licensee or permittee is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity. The licensee or permittee of a commercially operated AM, FM, TV or international broadcast station (as defined in this part) which licensee or permittee is not, or is not closely affiliated with a church, synagogue, or other religious entity, including a subsidiary of such an entity, shall nevertheless be deemed to be a religious broadcaster for purposes of this rule if the licensee or permittee devotes at least 50 percent of the airtime on each of its broadcast stations to religious programming and has either organic organizational documents that explicitly set forth a religious purpose or a distinct religious history. For purposes of this rule, religious programming shall mean [to be defined by the Commission].

The Commission should make clear that the rule attaches to a licensee rather than to a station and that a religious institution such as a church is exempt whether or not the broadcaster operates on a commercial or non-commercial basis. Any attempt to require that a percentage of time should be religious should apply only to for-profit religious broadcasters that are not church, synagogue etc. affiliated.


In addition, the FCC should provide further guidance as to how religious broadcasters will be treated under any new EEO rule. For instance, what forms will apply to religious broadcasters? What filings or certifications will be required? At a minimum, religious broadcasters should not be required to certify as to a legal conclusion — i.e. whether they comply with any new regulations. How will the FCC determine that a religious broadcaster is recruiting widely among its co-religionists without entangling itself in a religious institution's beliefs? The issues presented are complex and deserve careful treatment by the Commission so that constitutional rights are not infringed.

Conclusion

In sum, the FCC should exercise caution in arriving at a definition of a religious broadcaster and should clarify the respects in which any new rule will apply to religious broadcasters.

Respectfully submitted,

THE LUTHERAN CHURCH-MISSOURI SYNOD

By: 
Richard R. Zaragoza
Kathryn R. Schmeltzer
Michael W. Richards

Its Attorneys


Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037-1128
202-663-8000

Dated: May 29, 2002

CERTIFICATE OF SERVICE

I, Joan Taylor, a secretary with the law firm Shaw Pittman, hereby certify that a true and correct copy of the foregoing "Reply Comments of The Lutheran Church" was sent via U.S. First Class Mail, postage prepaid, this 29th day of March 2002, to the following:

Rosemary Harold, Esq.
Wiley Rein & Fielding
1776 K Street, NW
Washington, DC 20006
Counsel for the National Religious Broadcasters



Joan Taylor